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No. 03-1423

IN THE

Supreme Court of the United States

DARIN L. MUEHLER and ROBERT BRILL,
Petitioners,

vs.

IRIS MENA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S OPPOSITION TO PETITIONERS' WRIT OF CERTIORARI

Respondent Iris Mena submits this brief in opposition to the petition for writ of certiorari filed by petitioners Daniel L. Muehler and Robert Brill. Petitioners, who are police officers for the City of Simi Valley, seek to review the verdict reached by the jury and affirmed by the courts below that respondent's detention violated the Fourth Amendment and that petitioners were not entitled to qualified immunity.

There was ample evidence demonstrating the unreasonableness of respondent's detention, as the jury, district court and the Ninth Circuit correctly concluded. Moreover, the Ninth Circuit's opinion was in accord with the principles set forth by this Court in *Michigan v. Summers*, 452 U.S. 692 (1981). The unlawfulness of the officers' actions was clearly established at the time of respondent's detention. Moreover, there is no conflict between the decision in this case and the decisions of other circuit courts.

This is an inappropriate case to resolve the issue of whether mere questioning of an already lawfully detained individual constitutes an additional, unconstitutional seizure. Petitioners attempt to create a "compelling reason" for this Court to grant review by focusing heavily on the portion of the Ninth Circuit's opinion concerning respondent being questioned by the police officers about her citizenship. However, this portion of the opinion was unnecessary to the court's affirmance of the jury's verdict that the manner in which this detention was conducted was unreasonable.

Moreover, the Ninth Circuit did not hold that the questioning of respondent about her immigration status during her detention amounted to a separate seizure and an independent Fourth Amendment violation. This claim was not before the court. The questioning in the circumstances of this case was just one of many factors the jury considered in finding the extent of respondent's detention to be unreasonable.

The distinct factual and legal setting of this case also means that it is an inappropriate case to determine the permissible scope of questioning during traffic stops, stops at border checkpoints, or immigration detentions, which is precisely what petitioners urge this court to do with this case. Ultimately, the case prevents no "compelling reason" for review under SUP. CT. R. 10 and is ill-suited to resolve the issues petitioners identify.

STATEMENT OF THE CASE

A. Statement of Facts

On February 3, 1998, at approximately 7:00 a.m., officers of the Simi Valley Police Department SWAT team, including petitioners, forcibly gained entry into respondent's home at 1363 Patricia Avenue with a battering ram, to execute a search warrant relating to Raymond Romero, a tenant of respondent's parents who was not present at the time. ER 66.

The police came in with overwhelming force. There were at least eighteen officers present at the scene. Once the SWAT team made the initial entry and cleared the residence within minutes, police were confronted with four non-threatening non-suspects who had nothing whatsoever to

do with the suspect, Raymond Romero, or with any gang or criminal activity.

Respondent Iris Mena, an 18 year-old Salvadorian immigrant, was asleep in her bedroom located very near the point of entry when she was suddenly awakened by a loud bang. ER 111; SER 38. Her mother and father were both at work at the time of the search and thus respondent was alone and in an extremely vulnerable position. The bang was immediately followed by the forced entry of at least one armed man in dark clothing into her locked room. SER 111. The man pointed semi-automatic weapons in respondent's face as she awoke and ordered her to stand up and put her hands behind her back. ER 112; SER 78. She complied and was immediately grabbed by the hands and pushed face first onto the bed. ER 113.

Respondent initially had no idea who the men entering her home were or why they had entered her home. Respondent feared that the men had come to rob or kill her and she was terrified. ER 113-14. Respondent testified that during this initial encounter no one identified himself as a police officer. ER 112-14. Only when the man who pushed her onto the bed handcuffed her did respondent believe that the armed individuals in her house were police officers, because she believed that these were "the only persons who put handcuffs on people." ER 113. After being handcuffed, respondent was grabbed by the back of her shirt, pulled off the bed and led out to a garage. Id.

Petitioners Brill and Muehler played a pivotal role in the early morning operations. Petitioners supervised the execution of the search and were also in charge of overseeing the detention of the occupants of the house. ER 86 - 87, 172.

It was petitioner Muehler who ordered respondent and the three other persons found on the property be taken to the adjoining converted garage. SER 55. Petitioner Brill came into the garage several times during respondent's detention, SER 62, and either of the petitioners could have released her at any time. SER 55, 62.

Respondent was led outside in order to reach the garage. It was pouring rain on that morning and the ground was wet. ER 66, 115. At the time of her initial detention, respondent was wearing only green sweat pants, a black long sleeved shirt and had no shoes on her feet. ER 115. Respondent was forced to walk outside in the cold, pouring rain with no jacket and no shoes. Only after she had been exposed to the elements and sat in the damp garage in uncomfortable handcuffs for a half an hour to an hour did officers give respondent a jacket and some shoes to wear. ER 122, 131.

While she was held in the garage, an officer asked respondent if she was a legal resident of this country, even though this question was irrelevant to the purpose of the search. ER119-120. An INS officer, who petitioners brought on the search, ER 178-79, then asked respondent intrusive questions about her immigration status and inquired where her papers were. ER 120. Respondent, a legal resident of this country, ER 109, 120, stated that her documentation was in her purse and a police officer then went and searched it without respondent's permission. ER 120. The officer handed the documentation over to the INS agent. ER 120.[1]

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[1]Indeed, it was part of the respondent's theory of the case and the evidence presented that petitioners treated respondent so badly because they thought illegal aliens lived at the Mena's home, a home they described as a "poorhouse." ER 261-62. Moreover, petitioners had

During her detention, respondent also observed a female videotaping in the garage where she and the other residents of the premises were being detained. Respondent, who had not given the police permission to videotape her, was concerned about this additional intrusion into her privacy. ER 124-25. She asked an officer about the videotaping. ER 125. Instead of alleviating her anxiety and treating her with a modicum of respect, the officer yelled at her that it was part of their job to do that, and gave her no further explanation about the videotaping. ER 125.

Respondent was the only occupant present within the main house the morning of the search. She was not shown a search warrant or given an explanation for the search until after the search ended. ER 118. While she was held she heard and saw officers breaking things, including a door, in her home, all without the slightest explanation. ER 120-21. Respondent made repeated attempts to elicit an explanation for her detention from the officers who were in the garage with her and the other detainees. ER 117-18. She received either evasive responses or no responses at all. Id. On at least one occasion the officer whom she asked replied that they were not in charge of the operation and hence were not authorized to give her an explanation. ER117. She could hear officers breaking doors and inflicting damage to property in her home, while she was detained in a garage and treated as a person with no rights. ER 120-21.

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previously made a call to the Mena residence, though not for any gang affiliated activity. SER 47-48, 72-73. Thus, the unnecessarily harsh treatment of respondent on the morning of the search could properly have been viewed by the jury as payback for petitioners' prior exposure to the Mena family and petitioners' negative view of the occupants of the Mena home, rather than as legitimate law enforcement actions.

Petitioner Muehler acknowledged during trial that he and petitioner Brill were the ones in charge of overseeing the detentions, and that part of this task entailed addressing the questions of the individuals being detained. ER 182. Petitioners never approached respondent to give her an explanation, or to show her a search warrant, even though petitioners came to the garage during respondent's detention several times. SER 62, 97.

Respondent was detained in the garage in handcuffs for the duration of the search. SER 92. She testified that the handcuffs were "real uncomfortable," ER 119, and that they became even more uncomfortable as time progressed. Id. Respondent asked officers to remove the handcuffs but she was informed that "it was part of their job" to handcuff her, and that the "their highest officer" had ordered this. ER 118. Given the officer's attitude towards her from the beginning of the search, further requests would have seemed futile in her circumstances.

Petitioners justified respondent's detention and handcuffing by claiming they did not know the extent of respondent's involvement with Raymond Romero, the main target of the search, and also claimed "concern" that she might interfere with the search. ER 93. However, at trial, officers admitted that they did not suspect respondent of being involved in any crime, and agreed with the observation that respondent was completely cooperative throughout the entire ordeal from beginning to end. SER 40-41, 54. Searches of respondent's person and room, SER 19 (Exhibit. 13); 51, produced no contraband or any evidence of gang membership, SER 48-49, 51, 61, or criminal activity of any kind. SER 60-61. Petitioners never had any information that respondent

or her family were connected to any gang or criminal activity. Id. Indeed, respondent was never questioned about any gang activity or about anything other than her immigration status. Moreover, petitioners' knew that this was not a gang safe house. Petitioners in their affidavit of probable cause identified respondent's home as a "poorhouse." Petitioners admitted at trial that on their visit to the location one month prior to the search they encountered numerous residents but no one who they identified as gang members. Petitioners' information was that the only gang member who currently resided at the residence was Raymond Romero. Petitioners also had adequate personnel at their disposal to remove respondent's handcuffs after they cleared the residence and learned that Raymond Romero was not present. SER 167. In fact, within minutes the search site was deemed Code 4 "which means everything was calm and the risks were minimized." SER 86.[2]

Respondent remained in the garage, handcuffed and in great discomfort, for between two to three hours. ER 196. *Respondent was held this way for at least fifteen minutes to an hour after the search of the residence had been completed.* Respondent testified that her handcuffs were not taken off until she was brought into the living room. The police videographer testified that she was brought in to videotape the location after

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[2]Both SWAT Commander Lt. Thomas and defense expert witness Joseph Callanan testified on cross-examination that standard police procedure is that non-suspect detainees, who pose no threat to police officers should be released after they have been patted down for weapons and identified. SER 102-04 (Thomas); SER 138-43 (Callanan). Indeed, Mr. Callanan's testimony on cross-examination fully supported respondent's claim that petitioners had no justification for detaining respondent in handcuffs as long as they did. In addition, the tactical plan for this search provided for this. SER 8 (exhibit 11); 56, 96; ER 89.

the search was completed. SER 52, 115-17. Yet, the post-search videotape, which has a time stamp indicating it was made two hours after the SWAT team's entry, does not show respondent in the living room at all. Instead, it shows petitioner Muehler completing paperwork in the living room while respondent remained handcuffed in a cold garage. Petitioner Brill admitted that respondent was not released until at least ten to fifteen minutes after the search was concluded. Respondent testified that she was held as long as three hours. Therefore, the evidence at trial allowed the jury to find that respondent was held for as long as one hour after the search had been concluded. ER 89, SER 52, 115-117. At trial, the officers provided no justification for maintaining respondent under restraint after the search had ended.[3]

B. Proceedings Below

Respondent filed an action pursuant to 42 U.S.C. § 1983 alleging, in part, that the City of Simi Valley and eighteen of its officers, including petitioners, violated her rights under the Fourth and Fourteenth Amendments by unlawfully detaining respondent during the search of her home.

Before trial, all of the individual officers moved for summary judgment based on the affirmative defense of qualified immunity. ER 304. The district court denied the motion as to all but one of the officers and the remaining officers filed an interlocutory appeal contending that the United States Supreme Court's decision in *Michigan v Summers*, 452 U.S. 692, 705 (1981), gave them authority to detain residents during the lawful execution of a valid search warrant. On

[3]Respondent testified that she still suffers from nightmares, suffered humiliation and fear. ER 113, 118.

September 22, 2000, the Ninth Circuit held, *inter alia*, that the officers were not entitled to qualified immunity with regard to plaintiffs' claim that the circumstances of her detention violated the Fourth Amendment. *Mena v. Simi Valley*, 226 F.3d 1031, 1038-41 (9th Cir. 2000) ("*Mena I*"). The case was remanded for trial on plaintiff's remaining claims, including her unlawful detention claim.

On June 21, 2001, the jury found that petitioners violated plaintiff's Fourth Amendment rights by detaining her "with greater force than which was reasonable under the circumstances" and "for a period longer than reasonable." ER 273-274. The jury sided with petitioners on all other claims. ER 270-272. The jury awarded respondent $10,000 in compensatory damages and $20,000 in punitive damages against each of the petitioners. ER 276-277.

On July 24, 2001, petitioners filed a motion to amend the judgment, which was denied by the district court in an extensive opinion. ER 288. Petitioners appealed.

The Ninth Circuit upheld the trial court's ruling in *Mena v. City of Simi Valley*, 332 F.3d 1255 (9th Cir. 2003) (*Mena II*). It found that there were ample facts demonstrating the existence of an unreasonable seizure in violation of the Fourth Amendment. In particular, the Court noted: 1) respondent was awakened abruptly by a loud noise and opened her eyes to find a person dressed in black pointing a gun in her face; 2) no officer during this initial encounter identified himself as an officer and respondent believed that the persons in her room had come to rob her; 3) the officers searched respondent and her room, yanked her up from her bed by her shirt, and led her out of the room in her pajamas; and 4) although it was raining outside and respondent was barefoot,

the officers directed her outside and into a cold garage, where she was detained for two to three hours. *Id.* at 1261-1262. The Court found that these "heightened security measures" were unjustified in light of the fact that it was clear respondent posed no threat to the safety of the officers; the search of her room and residence produced no evidence of gang membership; respondent was not a suspect in the crime; and, although the 18 well armed S.W.A.T. members secured the house in a matter of minutes, she was handcuffed and detained for two to three hours. Based on these circumstances alone, the Court concluded that her detention was objectively unreasonable and "unnecessarily degrading [and] prolonged." *Id.* at 1263-1264.

The Court also found that the officers's questions about respondent's citizenship status and search of her purse for proof of citizenship also rendered her detention unreasonable. The Court did not find this to be a separate seizure, but rather a factor which rendered her *Summers* detention unreasonable. *Id.* at 1264-1266. However, it is clear that the Court found respondent's detention to be unreasonable and in violation of the Fourth Amendment independent of the questioning of her immigration status and the search of her purse. Thus, the portion of the opinion concerning the officer's questions regarding her immigration status was unnecessary and was dictum.

Petitioner's suggestion for a rehearing en banc was denied on January 14, 2004.

REASONS FOR DENYING THE PETITION

I. The Ninth's Circuit's Decision Is Consistent with *Michigan v. Summers* and Does Not Conflict with Rulings in Other Circuits.

A. Determining the Reasonableness of Respondent's Detention Is a Fact-specific, Individualized Inquiry.

The only issue this case presents is whether respondent's detention during the officers' search of her parents' home was unreasonable pursuant to the principles set forth by this court in *Michigan v. Summers*. The facts of this case and the opinions below simply do not raise any novel issue of law or any important question for this Court to decide given this limited fact-based context.

In *Michigan v. Summers*, 452 U.S. 692 (1981), this Court held that "a warrant to search for contraband founded on probable cause implicitly carries with it the *limited authority* to detain the occupants of the premises while a proper search is conducted." 452 U.S. at 705. (Emphasis added). However, *Summers* also held that "special circumstances" or "a prolonged detention" and other detentions which are not "routine" could give rise to a Fourth Amendment violation. *Id.* at 705 n. 21. Thus, *Summers* holds that police have limited authority to detain the occupant of a house without probable cause during the search when the detention is neither prolonged or unduly intrusive.

Petitioners do not dispute this reading of *Summers*. Rather, they claim that the Ninth Circuit's ruling is an expansive interpretation of *Summers* that conflicts with the

decisions of other courts of appeals. However, whether a particular seizure is reasonable is a fact-specific inquiry that varies from case to case. As stated by this Court in *Graham v. Connor*, 490 U.S. 386, 398 (1989), when determining the reasonableness of a detention courts must pay "careful attention to the facts and circumstances of each particular case." The court must weigh factors "including the severity of the crime, whether the suspect poses an immediate threat to the safety of the officers and others, and whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight." *Id.* at 396. This is what occurred in this case.

The fact-specific inquiry a court must engage in to determine the reasonableness of a particular detention thus belies any assertion that the Ninth Circuit's ruling somehow expands *Summers* or conflicts with the rulings in other courts of appeal. The jury, the district court, and the Ninth Circuit concluded, based on the facts before them, that respondent's detention was unlawful. As demonstrated below, this conclusion was certainly reasonable given the facts of this case. Indeed, what petitioners present as a conflict between the circuits is actually just an account of different assessments of reasonableness in the particular circumstances of the cases and not a conflict about the applicable legal norms.

B. The Ninth Circuit's Decision Was a Correct Application of *Michigan v. Summers*.

Petitioners ignore the requirement that the facts must be viewed in the light most favorable to the jury verdict when determining the lawfulness of respondent's detention. There is little doubt that the facts of this case support the jury's verdict that respondent's detention was prolonged, unduly intrusive and and hence unreasonable.

Respondent was an 18 year-old female at the time of the detention. Although she was not a suspect, the officers broke into her room and pointed guns into her face without identifying who they were. After complying with the officers' commands to stand up and put her hands behind her back, respondent was grabbed by her hands and pushed face first onto the bed. After being thrown on the bed, respondent was handcuffed and yanked up by her shirt and led outside in the pouring rain and cold in her pajamas and without shoes. Respondent was subsequently made to sit in a damp and cold garage for a half hour to an hour before she was finally brought a jacket and shoes to put on.

Respondent complained to the officers that her handcuffs were too tight and uncomfortable but they refused to loosen them.[4] Respondent was detained and kept in handcuffs for at least three hours in the damp garage even though she posed no threat to the safety of the officers and she made no attempts to flee or destroy any contraband. There was also no evidence she was affiliated with any gang or that she had committed any crime. Respondent was compliant with the officers' commands at all times and the officers conceded at trial that they did not believe she posed a threat. Further, there were 18 officers involved in the search and the premises were secured in a matter of minutes. Finally, respondent remained in handcuffs for at least 15 minutes to an hour *after* the search had been completed.

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[4]Petitioners assert that because respondent did not specifically state the handcuffs were painful the officers did not loosen them. However, after the officers refused to loosen her handcuffs when she said they were too tight and uncomfortable, respondent would have no reason to believe that telling the officers her handcuffs were painful would have caused them to loosen them.

Based on these facts, it was reasonable for the jury[5], the district court, and the Ninth Circuit to conclude that respondent's detention was unlawful. These facts establish that respondent's detention was anything but routine. Respondent's detention is also a far cry from that of the detention in *Summers*, where the respondent was not handcuffed, not made sit in a cold and damp garage for two to three hours, and was not detained after the search was concluded. Petitioners exclude the facts which are most favorable to the jury verdict when arguing that the rulings below are an expansion of *Summers*. When the facts they exclude are considered, it is readily apparent that no expansion of any sort has taken place here.

Indeed, petitioners cannot point to any error of law made by Ninth Circuit in *Mena II* when concluding there was a constitutional violation, and essentially just complain about the result. This Court should not grant certiorari merely to reexamine facts that the jury, the district court, and the Ninth Circuit have already considered and determined are sufficient to support a finding that respondent's detention was unreasonable.

The Ninth Circuit also correctly decided that the unlawfulness of the officers' conduct was clearly established at the time of the detention. In *Hope v. Pelzer*, 538 U.S. 730 (2002), this Court stated that qualified immunity is unavailable if the legal landscape at the time of the detention provided

[5]Indeed, Petitioners do not raise in this petition the issue of whether the district court erred when instructing the jury on what constitutes an unlawful detention and have therefore conceded that the instruction was correct. This further demonstrates the reasonableness of the jury's conclusion that the detention was unlawful given they were properly instructed on what constitutes an unlawful detention.

reasonable officers with fair warning that their conduct was unconstitutional. *Id.* at 739-740. Moreover, this Court further held in *Pelzer* that an official action is not protected by qualified immunity just because the very action in question had not been previously held unlawful. *Id.*

In this case, existing case law clearly supported the jury verdict and the district court's and Ninth Circuit's qualified immunity analysis. Petitioners dispute the conclusion that the unlawfulness of respondent's detention was clearly established by arguing that no reasonable officer in 1998 would have known that pointing a gun at respondent and handcuffing her for two to three hours during a *Summers* detention was unlawful. This argument lacks merit, however, because the officers' conduct was not limited to pointing a gun at respondent and handcuffing her, but involved other conduct clearly making this detention unreasonable. Indeed, even though respondent was not a suspect and there was no evidence that she was affiliated with any gang or had committed any crime, she was still handled roughly, made to march through the rain in bare feet, and made to sit in a cold and damp environment for hours in overly tight handcuffs. *See Franklin v. Foxworth*, 31 F.3d 873, 876-877 (9th Cir. 1994) (lawfulness of police detention of a non-suspect during search rests on evaluation of *Graham* factors; the fact that the police had no reason to believe that the detainee had committed a crime, was armed, was a gang member, posed any danger to them, or presented a risk of flight rendered the detention unreasonable and precluded qualified immunity).

Moreover, respondent's continued detention in handcuffs after the conclusion of the search was clearly established as being unlawful at the time it occurred. As stated in *Summers*, the initial authority to detain a non-suspect only

exists during the execution of a proper search. 452 U.S. at 705. This establishes that the Ninth Circuit's decision on qualified immunity was correct and consistent with this Court's rulings. All of the facts and circumstances of this case support the jury's verdict and the denial of qualified immunity.

C. The Ninth Circuit's Ruling Is Not in Conflict With Other Courts of Appeal Decisions Regarding the Application of *Michigan v. Summers*.

Petitioners' strained attempt to manufacture a conflict between the Ninth Circuit and other courts of appeal regarding the application of *Michigan v. Summers* is unavailing. The Ninth Circuit's decision in *Mena II* does not conflict with the rulings made by other courts of appeal. Like the Ninth Circuit opinion, each of the cases cited in petitioners' writ (*See Pet. Writ. 16-18)* recognize that *Summers* only granted law enforcement officials limited authority to detain occupants during the search of the premises pursuant to a valid search warrant and that prolonged or unduly intrusive detentions may violate the Fourth Amendment. Further, each of the cases petitioners identify also employ a totality of the circumstances test to determine the reasonableness of the detention. The fact that in some of the cases the courts found there was no Fourth Amendment violation in no way means that these decisions conflict with the Ninth Circuit's application of *Summers* in this case. On the contrary, what accounts for the different results is that the other cases were decided in the context of different facts and circumstances.

Indeed, this case is readily distinguishable from the two cases that petitioners argue clearly contradict the Ninth

Circuit's decision in *Mena II*. In *Pikel v. Garrett*, 55 Fed. Appx. 29 (3rd Cir. 2002), an unpublished decision, many of the employees who were detained and handcuffed for three and a half hours had criminal records. *Id.* at 31. One employee was found to have been carrying a gun at the time of her detention. The search also took place in an auto body shop where many of the tools in the shop could have been used as weapons. Pikel was pushed to the ground and had a gun pointed at his face because he failed to comply with the officers' orders to "get down." *Id.* It was on the basis of these very different facts that the *Pikel* court concluded that the plaintiffs' detention was reasonable.

This differs significantly from this case where there was no evidence that respondent had a criminal background, there were no weapons found on her when she was detained, and she was compliant at all times with the officers' commands. The employees in *Pikel* were also not held in handcuffs and detained after the search completed.

In *United States v. Fountain*, 2 F.3d 656 (6th Cir. 1993), handcuffing the occupants and forcing them to lay face down during the search was justified by several circumstances not present in this case. First, during a prior search of Fountain's home, Fountain was observed destroying contraband and automatic handguns were also seized from his home. *Id.* at 659. Moreover, during the search, narcotics were found in Fountain's pocket and three firearms were found in the hall closet. *Id.* at 660. The *Fountain* court ruled that in light of these circumstances, the actions of the law enforcement officials were reasonable and proportional to their interests in preventing flight and minimizing the risk of harm to the officers. *Id.* at 663. Nothing even remotely approaching these circumstances was present in this case.

Petitioners are also incorrect in their assessment that this case is less egregious than the cases they identify in their petition (*See Pet Writ.* at 17-18) where a Fourth Amendment violation was found by the court. Indeed, petitioners' argument in this regard is premised on the false notion that this is simply a handcuffing case and that the Ninth Circuit's ruling was that handcuffing a suspect for two-three hours during a search is a per se constitutional violation. As shown above, this was not the court's ruling. In fact, this case is just as egregious if not more egregious than the cases they cite in that, in addition to the facts described above, respondent was detained after the search had been completed, which did not occur in any of the other cases. Further, in *Pecsi v. Doyle*, 940 F.2d 661(6th Cir. 1991) 19 WL 137957 at 1-3, an unpublished opinion cited by petitioners, the detainee was not even handcuffed and was permitted to move around his apartment if accompanied by an officer. Nonetheless, the court found there was a Fourth Amendment violation with respect to the manner of Pecsi's detention.

As for the Ninth Circuit case *Meredith v. Erath*, 342 F.3d 1057 (9th Cir. 2003), petitioners' summary of the case is misleading. Plaintiff Meredith made two unlawful detention claims. The first was based solely on her being handcuffed and detained in handcuffs during the search. *Id.* at 1062. As to this claim, the court determined that under the totality of the circumstances Meredith's detention in handcuffs was not justified. *Id.* At 1062-1063. However, the court found that the officers were entitled to qualified immunity on this claim because it had not been clearly established that handcuffing a person and detaining her in handcuffs under the circumstances the officers faced in *Meredith, standing alone,* would violate

the Fourth Amendment.[6] This ruling is not inconsistent with the holding in *Mena II* because the court's ruling that petitioners were not entitled to qualified immunity was not limited to the act of handcuffing as it was in *Meredith*, but was based on the totality of the officers' conduct during the seizure as described above. *Id.* at 1266-1267.

As to Meredith's second unlawful detention claim, this was based on her being kept in overly tight handcuffs. The court found that this fact rendered her detention unreasonable and that the officers were *not* entitled to qualified immunity. *Id.* at 1063-1064. Since respondent was also kept in overly tight handcuffs throughout her detention, this case is fully consistent with *Meredith*, contrary to petitioners' assertion.

Thus, not only is there no conflict between *Mena II* and the decisions of other courts of appeal with respect to the application of *Summers*, there is also no intra-circuit conflict in the Ninth Circuit. This case therefore does present this Court with an opportunity to resolve any conflict whatsoever, as the Ninth Circuit and the other courts of appeal have employed the same principles in their application of *Summers*.

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[6]The opinion states that it had not been established by July 10, 1998 in other circuits that simply handcuffing a person and detaining her in handcuffs would violate the Fourth Amendment. *Id.* at 1063. However, this is clear error because the case *Meredith* cites to for this proposition, *Heitschmidt v. City of Houston*, 161 F.3d 834, 838-839 (5th Cir. 1998) found that there was no qualified immunity for a detention involving handcuffing that occurred in *1994*.

II. This Is an Inappropriate Vehicle to Decide the Issue of Whether Mere Questioning of an Already Lawfully Detained Person Constitutes an Additional, Unreasonable Seizure in Violation of the Fourth Amendment.

A. To the Extent the Ninth Circuit Opinion Addresses the Issue of Whether Mere Questioning Can Constitute a Separate Constitutional Violation, it Is Dictum.

Petitioners argue that this is an appropriate case for this Court to decide the issue whether "mere questioning of an individual who has been lawfully seized can constitute an additional, unreasonable seizure." *Pet. Writ* at 9. In making this argument, petitioners focus heavily on the portion of the Ninth Circuit opinion concerning respondent being questioned by the officers about her immigration status. However, petitioners do not dispute that the Ninth Circuit found respondent's seizure to be unlawful even in the absence of her being questioned about her immigration status. Thus, any discussion of whether this questioning was itself a constitutional violation is dictum. Moreover, petitioners also concede that the parties never briefed the issue of whether mere questioning constitutes a separate constitutional violation to the court or presented it to the jury.[7] Thus, to the extent any portion of the Ninth Circuit's opinion touches upon this specific issue, it is dictum as well.

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[7]Respondent merely argued to the jury and the courts below that the act of her being questioned about her immigration status was one of many factors that rendered her detention unconstitutional.

Further, resolving this issue would have no impact on the outcome of this case unless this Court also found that all of the facts regarding respondent's detention were insufficient to establish a Fourth Amendment violation. However, respondent has already demonstrated that the Ninth Circuit's decision regarding the unlawfulness of her detention was correct when all the facts and circumstances of her detention are taken into account. Therefore, granting review as to issue number one of petitioners' writ would be inappropriate because the questioning issue is unnecessary to the holding in this case and would be tantamount to an advisory opinion.

B. The Ninth Circuit Did Not Hold That the Officers' Questions About Respondent's Immigration Status Constituted a Separate, Additional and Unconstitutional Seizure.

Petitioners misconstrue the holding in *Mena II* when arguing that the Ninth Circuit held that the officers' questions to respondent about her immigration status constituted a separate, additional and unconstitutional seizure. At no point in the opinion does the Ninth Circuit state that the questioning amounted to a separate, unconstitutional seizure. The Ninth Circuit's analysis was focused on whether there were sufficient facts to sustain the jury's verdict that respondent's detention was unreasonable. In this context, the Ninth Circuit found that questioning Mena about her immigration status and searching her purse were among many factors that rendered her detention unreasonable.[8] The court did not rule that her questioning

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[8]Indeed, the fact that the Ninth's Circuit's holding was also based on the fact the officers searched respondent's purse for proof of citizenship is another reason why this case is not appropriate to decide issue number one of the writ.

amounted to a separate, constitutional violation, nor could it without that portion of the opinion being dictum, considering respondent never argued this below or briefed this issue to the Ninth Circuit. 332 F.3d at 1264-1266.

Since the Ninth Circuit never ruled that the officers' questions regarding respondent's immigration status amounted to a separate, unconstitutional seizure, and considering respondent never advanced this argument at trial or on appeal, this obviously would be an inappropriate case to decide the issue of whether mere questioning of an already lawfully detained person could constitute a separate, unconstitutional seizure. Moreover, the fact that the Ninth Circuit did not find that there was a separate, unconstitutional seizure means that there is no conflict with the Seventh Circuit case *Martinez-Camargo v. INS*, 282 F.3d 487 (7th Cir. 2002), as petitioners argue. Indeed, *Martinez-Camargo* specifically held that an officers' questions about the detainee's immigration status could be considered in determining the reasonableness of the initial detention even though they did not create a separate seizure. 282 F.3d at 487. This alone is grounds to deny certiorari as to issue number one of petitioners' writ.

C. This Is Not an Appropriate Case to Resolve the Circuit Conflict Petitioners Identify.

Petitioners argue that this is an appropriate case to resolve the conflict between the court of appeals on the issue of whether an officer must have a reasonable suspicion to question a lawfully detained individual on matters unrelated to the reason for the initial detention when the questioning does not expand the length of detention. However, even a cursory examination of the cases cited in petitioners' writ (*Pet Writ* at

10-11) reveals that the legal and factual background of those cases is markedly different from this one, thus making this an inappropriate case to resolve the conflict petitioners identify. Indeed, petitioners are only able to create a conflict by ignoring the context of the cases they cite, including the facts of this case.

The majority of the cases cited by petitioners involve questioning by law enforcement officers about other possible crimes during routine traffic stops and fall under *Terry v. Ohio*, 392 U.S. 1 (1968) and its progeny. *See United States v. Holt*, 264 F.3d 1215, 1218-1219 (10th Cir. 2001), *United States v. Pruitt*, 174 F.3d 1215, 1217-1219 (11th Cir. 1999), *United States v. Ramos*, 42 F.3d 1160, 1161-1163 (8th Cir. 1994), *United States v. Murillo*, 255 F.3d 1169, 1172-1173 (9th Cir. 2001); *United States v. Jones*, 44 F.3d 860, 871 (10th Cir. 1995); *United States v. Barahona*, 990 F.2d 412, 416 (8th Cir. 1993); *United States v. Crain*, 33 F.3d 480, 481-482, 485 (5th Cir. 1994); *United States v. Shabazz*, 993 F.3d 431, 434-435 (5th Cir. 1993). The case *United States v. Childs*, 277 F.3d 947 (7th Cir. 2002) is also a traffic stop case, although it rejects employing a *Terry* analysis in favor of a probable cause arrest analysis. *Id.* at 952-953.

United States v. Chacon, 330 F.3d 323, 325, 327 (5th Cir. 2003) and *United States v. Muchaca-Barrera*, 261 F.3d 425, 429, 431 (5th Cir. 2001) are border detention/ checkpoint cases which fall under the *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), line of cases. Finally, *United States v. Martinez-Camargo*, 282 F.3d 487, 489-490 (2002) is an investigatory stop/ immigration detention case.

By contrast, this case concerns the detention of a non-suspect resident during a search of the premises pursuant to a

valid search warrant. This case falls within the ambit of *Michigan v. Summers*. As such, this is an inappropriate case to decide the permissible scope of questions a law enforcement officer may ask during a traffic stop, a border/checkpoint detention, or an investigatory stop/immigration detention. This is because whether or not an officer's questioning renders a detention unreasonable turns on the facts and circumstances unique to each of these settings. The fact that all of the cases involve questioning does not overcome the fact that law enforcement officials are confronted with different concerns depending on the context they may find themselves in. Therefore, having this case set the parameters of permissible questioning in other, dissimilar law enforcement settings will do little to clarify what constitutes permissible or impermissible questioning and will likely lead to additional confusion. Accordingly, this case is not an appropriate vehicle to resolve the circuit conflict petitioners identify.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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